



Montana Fish, Wildlife & Parks

November 22, 2004

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Montana Water Court

Chief Water Judge C. Bruce Loble
Montana Water Court
P.O. Box 1389
Bozeman, MT 59771-1389

Re: Draft 10/12/04 Water Right
Adjudication Rules

Dear Judge Loble:

The Montana Department of Fish, Wildlife and Parks ("DWWP") thanks you for the opportunity to review and comment on your October 12, 2004 version of the Draft Water Right Adjudication Rules ("Draft Rules"). DFWP respectfully submits the following comments, concerns, recommendations and objections for your consideration.

I. GENERAL COMMENTS, CONCERNS, RECOMMENDATIONS AND OBJECTIONS

1. DFWP fully supports your proposed timeline for submitting proposed Adjudication Rules to the Supreme Court on or before January 1, 2005. As you are aware, revision of the existing claim examination rules has been the subject of a vigorous and ongoing public debate since the 1999 Montana Legislature considered H.B 407, sponsored by Rep. Cindy Younkin. DFWP and others have spent countless hours preparing and submitting comments on proposed revisions to the existing claim examination rules over the past five and one-half years. It is time for the Montana Supreme Court to wrestle with and, hopefully resolve, the numerous issues that have been discussed with you, the Adjudication Advisory Council ("AAC") and the Environmental Quality Council ("EQC") since 1999.

2. The Draft Rules are a significant improvement and add needed consistency and specific language defining adjudication and claim examination procedures. For example, DFWP is especially pleased with the new language addressing late claim administration, costs, and

subordination issues (Rules 1.II(30) and 6.V).¹ DFWP is also pleased that the Draft Rules incorporate several recommendations and objections made by DFWP to previous adjudication rule proposals that you submitted for public review and comment.

3. Despite significant improvements, the 10/12/04 Draft Rules still do not address several crucial issues raised in previous comments submitted by DFWP and others to draft Water Court adjudication rules and notices soliciting public comment. *See, e.g.*, comments submitted by DFWP to your draft adjudication rules and notices on July 3, 2002, November 13, 2002, May 9, 2003 and September 10, 2004. *See also* the January 12, 2001 proposed rule language submitted by DFWP's retained counsel on behalf of an advisory group you created to address proposed on motion issues. DFWP is disappointed that the Draft Rules do not contain detailed language describing on motion and enforcement decree procedures.

4. The Draft Rules specify that contacts and correspondence with the Department of Natural Resources and Conservation ("DNRC") and all records pertaining to the centralized record system must be available for public inspection and documented in the claim examination files. *See, e.g.*, Rules 1.IV(5) & 6.XII. However, the Draft Rules do not address or require that the Water Court's involvement in the claim examination and other pre-decree processes be fully documented in the public files maintained by the Water Court and DNRC. Article II, Section 9 of the Montana's Constitution applies to the Water Court as well as DNRC. While Water Court orders and decisions affecting the issuance of decrees are placed in the public records of the Water Court and DNRC, directives from the Water Court to DNRC concerning remarks to claims, summary reports, and other claim examination issues have generally not been part of the public record and placed in the claim examination files. The Draft Rules should be amended to specify that directives and determinations made by the Water Court, whether by a Master or the Chief Water Judge, concerning claim examination and the pre-decree processing of claims must be fully documented in the claim files. Claimants, objectors, and the public have a constitutional right to know how directives and determinations made by the Water Court are affecting claim examination and the pre-decree processing of claims. Ensuring public access to such pre-decree Water Court directives is also the best protection available to claimants and objectors under the limited disqualification provisions of the S.B. 76 adjudication.

I. RULE 1.I

5. **Rule 1.I(4) & (5).** The word "stream" should be deleted from the phrase "Montana's general stream adjudication." The SB 76 adjudication is not limited to the adjudication of surface waters. Ground water claims are also being adjudicated.

III. RULE 1.II

¹ All references to the Draft Rules in this letter are to the proposed Rule number in the October 12, 2004 draft.

6. **Rule 1.II(3).** This Rule confirms and specifies that a Water Master and the Chief Water Judge will be involved in reviewing and approving the DNRC summary reports that are ultimately used by the Water Court to issue decrees. The instructions, directives, and other decisions made by a Water Master or the Chief Water Judge concerning a summary report, including any supporting research or memoranda relied on by the Water Court, should and must be publicly disclosed under Article II, Section 9 of the Montana Constitution. For example, the Bean Lake issue remark that was the subject of the litigation in the *Matter of the Adjudication of Existing Rights in Basin 41I*, 311 Mont. 327, 55 P. 2d 396 (2002, hereinafter "*Bean Lake III*"), was a Water Master's hand-written remark in a summary report. The genesis of such remarks, and any other pre-decree Water Court directives to DNRC, are important to claimants and objectors who may question why DNRC or the Water Court has inserted a remark or altered a claim abstract. See General Comment 3, pages 1 & 2 of this letter.

7. **Rules 1.II(7), (9) & (10) -- the On Motion Issue.** When these on motion rules are read together, it appears you have rejected a mandatory on motion process that will resolve all substantive factual and legal issue remarks that could affect the accuracy of decrees.² Rule 1.II(9) states that all issue remarks not resolved in the objection process "shall be addressed by the water court." However, Rule 1.II(9) does not specify how unresolved issue remarks will be "addressed" or commit the Water Court to the exercise of its on motion powers to resolve substantive issue remarks not resolved by an adversarial objection. Rules 1.II(7) and (10) then appear to reaffirm your September 13, 2004 statements to the EQC in which you indicated you would continue your limited exercise of on motion powers in the absence of legislation directing the Water Court to implement a mandatory on motion policy. DFWP is disappointed that the Draft Rules do not reflect the Attorney General's mandatory on motion proposal, the 5-2 vote of the AAC supporting the Attorney General's mandatory on motion policy, and the EQC's support for a similar policy. DFWP remains committed to an adjudication that will resolve all substantive factual and legal issue remarks that could affect the accuracy of decrees. A mandatory Water Court on motion policy appears to be the only politically and financially feasible alternative available at this time. DFWP will continue to seek implementation of rules and laws that ensure the accuracy of decrees issued by the Water Court.

8. **Rule 1.II(8) -- Mandatory Hearings on Fish, Wildlife, and Recreation Claims.** This rule commits the Water Court to holding an evidentiary hearing on over 13,000 fish, wildlife, and recreation claims even if the claims contain no issue remarks or have not received an adversarial objection. You have previously indicated at AAC meetings that you interpret *Bean Lake III* to require a mandatory hearing on all fish, wildlife and recreation claims. DFWP respectfully disagrees with your conclusion and submitted a May 9, 2003 letter outlining the basis for DFWP's position. The following analysis is again offered for your consideration:

² DFWP does not believe it is necessary for the Water Court to conduct an evidentiary hearing on all issue remarks not resolved by an adversarial objection or DNRC claim examination and negotiations. DFWP interprets the phrase "mandatory on motion policy" to mean that the Water Court could identify and set forth in the Adjudication Rules those issue remarks that it would not call in on its own motion because the substantive effect of the unresolved issue remark on the accuracy or enforceability of a decree is *de minimus*.

The Supreme Court has instructed the Water Court to "identify, review and hold hearings in a manner similar to Adjudication of Water Rights of Yellowstone River, 253 Mont. 167, 832 P. 2d 1210 (1992), on all pre-1973 recreation, fish and wildlife claims, both diversionary and non-diversionary, and determine the validity of such claims under the holding herein." *Bean Lake III*, at pp. 345 and 346. *Adjudication of Yellowstone River* is the late claim case in which Montana's highest court concluded that the filing deadline established under 85-2-221(1), MCA, was constitutional and late claims were forfeited under 85-2-226, MCA. The Supreme Court also held that a late claimant was not deprived of due process because the Water Court had provided an opportunity for an evidentiary hearing to determine if a claim had actually been timely filed on or before the April 30, 1982 deadline. *Id.*, at pp. 176, 178 and 179. This is the only Water Court hearing requirement specifically recognized in *Adjudication of Yellowstone River* and the right to a hearing is conferred only if a late claimant asserts that his or her claim was not filed late.

Adjudication of Yellowstone River did not mandate or guarantee that every person who filed a late claim was entitled to a hearing on every late claim filed. Absent an assertion by a late claimant that a late claim was timely filed, the Supreme Court clearly upheld the Water Court's authority to terminate the late claim without a hearing (the Legislature subsequently adopted the partial remission of forfeiture language in Section 85-2-221, MCA). The Supreme Court's *Bean Lake III* directive to hold hearings on "all" diverted and nondiverted FWR claims in "a manner similar to" the hearings required under *Adjudication of Yellowstone River* requires clarification in light of the hearings actually mandated in the late claim case.

Based on *Adjudication of Yellowstone River*, and consistent with the prima facie proof provisions of Section 85-2-227(1), MCA, it is DFWP's position that *Bean Lake III* requires the Water Court to hold hearings on fish, wildlife, or recreation claims only if:

1. Claim examination by DNRC and the Water Court generates a legal issue remark questioning the validity of a fish, wildlife, or recreation claim under *Bean Lake III*;
2. Claim examination by DNRC and the Water Court generates a factual or legal issue remark concerning any other element of a fish, wildlife, or recreation claim;
3. A fish, wildlife, or recreation claim receives an adversarial objection; or
4. The person filing a fish, wildlife, or recreation claim objects to an issue remark or other action taken by DNRC or the Water Court in the claim examination or pre-decree processing of the claim.

DFWP hopes you agree that it is important to ask the Montana Supreme Court to provide guidance on the mandatory hearing issue when revised adjudication rules are presented to the Supreme Court for review and adoption. If *Bean Lake III* requires mandatory Water Court hearings on all fish, wildlife and recreation claims, including legislatively authorized Murphy

Rights, then so be it. All of the interested parties involved in *Bean Lake III* will most assuredly be involved in the Adjudication Rule proceedings before the Supreme Court just as they have been involved in the on-going Adjudication Advisory Council debates. A proposed Adjudication Rule requiring a mandatory hearing on all fish, wildlife and recreation claims can easily be adopted or modified by the Supreme Court after it considers comments and arguments on the issue.

9. **Rule 1.II(15) -- Admissibility of DNRC Data.** This new rule appears to narrow the scope of DNRC information and data that will be admissible in Water Court proceedings. The second paragraph of existing Rule 1.II(2) provides that "investigation reports, data or other written information produced or promulgated by ... [DNRC] under the direction of the water courts pursuant to § 85-2-243, MCA, shall be admissible without further foundation and not subject to the hearsay objection in any proceedings before the water court...." Draft Rule 1.II(15) now restricts the admissibility of DNRC data to "a memorandum in response to a request for assistance" and field investigation reports prepared at the direction of the Water Court or a site visit. DFWP is concerned that general claim examination information compiled by DNRC in examining aerial photographs and water resource surveys will not be admissible under the rule as proposed. Limiting the admissibility of DNRC information and data as proposed in new Rule 1.II(15) will not improve the accuracy of decrees. DFWP recommends that the language in existing Rule 1.II(2) be retained and incorporated into proposed Rule 1.II(15).

10. **Rule 1.II(22) -- Burden of Proof.** The second sentence of this rule should expressly state that the prima facie proof of a claim may be "overcome by other evidence, including, but not limited to, post June 30, 1973 evidence or Department information and data admissible under Rule 1.II(15)," This recommendation is consistent with and expressly recognized in your March 11, 1997 Memorandum Opinion in case 40G-2. It is important that the Adjudication Rules continually recognize that DNRC information compiled during the claims examination process is admissible in Water Court evidentiary hearings and can overcome the prima facie status of a claim.

11. **Rule 1.II(23) -- Water Court Review of Settlements.** DFWP strenuously objects to the third paragraph of this rule. You propose that when a settlement stipulation reduces the element of a claim, the Water Court "does not need to determine whether the burden of proof has been met" and the Court may accept the reduction without further presentation of evidence. If the claim in question has been abandoned or an exaggerated flow rate has been claimed (e.g., the claimant has historically used only 1.5 cfs), a claimant's willingness to reduce the flow rate from 10 cfs claimed to 9.8 cfs does nothing to ensure that the claim will be accurately decreed. Carte blanche acceptance of reductions in the elements of a claim is not warranted if there are issue remarks or other claim information questioning the validity, existence, or historic use of the right.

DFWP previously addressed this issue in its July 3, 2002 comments and recommendations on the April 30, 2002 Draft Rules. Based on its 2002 comments, DFWP proposes that settlements reducing the elements of a claim should require the presentation of additional evidence if issue remarks in the claim abstract or other information in the claim file identify any of the following issues:

- A. No evidence of historic use;
- B. No evidence that the right has been used for the preceding ten (10) years;
- C. The flow rate or volume in the settlement agreement exceeds the capacity of the diversion or conveyance structure;
- D. Nonperfection of a filed notice of appropriation;
- E. Inability to identify the historic point of diversion or the place of use;
- F. A decree exceeded issue;
- G. Duplicate claim; or
- H. Overlapping or conflicting ownership.

12. **Rule 1.II(24) -- Objections to Master's Reports.** The second paragraph of this rule appears to shorten the time period for filing objections to Master's Reports. Existing Rule 1.II(4) states that objections may be filed within "ten (10) days after being served with notice of filing of the master's report...." The existing rule language is clear and consistent with the language in Rule 53(e)(2), M. R. Civ. P., governing objections to Master's Reports in Montana's District Courts. New proposed Rule 1.II(24) requires objections to be filed within "10 days after the service date of the notice of filing of the master's report." The new rule starts the ten (10) day period for filing objections on the date the Water Court clerk mails the Master's Report to the parties, not the date on which the parties receive mailed service of the Master's Report. DFWP objects to any reduction in the ten (10) period for filing objections to Master's Reports as provided in the existing Rule 1.II(4) and Rule 53(e)(2), M. R. Civ. P.

13. **Rule 1.II(31) -- Enforcement Decrees.** Procedures governing the compilation and modification of claims during the preparation of enforcement decrees should be described in the Adjudication Rules. *See* General Comment 3, pages 1 & 2 of this letter.

IV. RULE 1.III

14. **No Definition of "High Water Claim."** The Water Court has historically decreed claims that are used only during high water or flood events. However, the term "high water

claim" has never been defined and it has been DFWP's experience that individual case decisions have allowed the use of high water claims when streams and rivers were neither high nor at flood stage. DFWP requests that the Water Court define the term "high water claim" based on its experience and decisions. *See also* DFWP's July 3, 2002 comments on the April 30, 2002 Draft Rules.

V. RULE 1.IV

15. **Rule 1.IV(5).** Water Court directives and decisions concerning the centralized record system should and must be available for public inspection. *See* General Comment 4, page 2 of this letter and DFWP's July 3, 2002 comments on the April 30, 2002 Draft Rules.

VI. RULE 1.VI

16. **Rule 1.VI(2)(a).** This rule states that the summary report and DNRC's supporting documentation will "be available for inspection and copying by all persons." This public disclosure requirement should be expanded to include all directives, decisions, and orders of the Water Court. *See* General Comment 4, page 2 of this letter.

VII. RULE 2.V

17. **Rule 2.V(2)(d).** This rule only requires DNRC to contact the claimant when a reservoir's volume is greater than 50 acre-feet. The claimant should be contacted regardless of the size of the reservoir.

Thank you again for the opportunity to submit comments on the Draft Adjudication Rules.

Sincerely,



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